COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-864

COMMONWEALTH

vs.

SILAS RANKINS.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court jury convicted the defendant, Silas Rankins, of possessing a firearm without a license, in violation of G. L. c. 269, § 10 (a).[2] The defendant argues that the evidence was insufficient and that the police officers' testimony, the cross-examination of the defendant, and the prosecutor's closing argument were improper. We affirm the judgment.

Background. Viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the jury could have found the

[1] "We spell the defendant's name as it appears in the indictment." Commonwealth v. Bell, 83 Mass. App. Ct. 82, 82 n.1 (2013).

[2] The same jury acquitted the defendant of assault and battery, making threats, and assault by means of a dangerous weapon.

following: On July 9, 1999,[3] the defendant was at his mother's home at 112 Magnolia Street in the Roxbury section of Boston. He was with his girlfriend, DaClaisha Avant, and her friend Marissa Raspberry. The defendant showed Avant and Raspberry a silver handgun with a brown ammunition clip. After the defendant and Avant argued about the defendant's playing with the gun, he took it, left the home, and walked outside for a few minutes.

The defendant returned to the home. Raspberry did not see the gun again. The defendant and Avant continued to argue. Eventually, all three people left the house, and once outside, the defendant argued with both women. He threatened to shoot Raspberry.

Avant decided to stay with the defendant; Raspberry left. The defendant went to some bushes in a vacant lot across from 112 Magnolia Street. (The defendant later told detectives that he kept his gun in the lot.) Then Raspberry heard gunshots coming from the direction of the lot across from 112 Magnolia Street. Avant also heard gunshots, but she was not sure where they came from.

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[3] After the defendant's conviction on April 6, 2000, the defendant filed a notice of appeal on May 24, 2000. On July 24, 2001, his appeal was dismissed for lack of prosecution pursuant to Appeals Court Standing Order 17A. On June 30, 2017, we allowed the defendant's motion to reinstate his appeal and the appeal was assigned a new docket number.

The next morning, Avant asked the defendant if he had fired a gun at Raspberry. The defendant answered that he did fire the gun but did not intend to kill Raspberry.

After police arrested the defendant, he admitted that he had fired the gun at Raspberry, but claimed that he had fired in the air to scare her without intending to kill her. He described the gun as a .25 caliber silver gun with a brown handle. The police did not find the gun, but did find a .25 caliber shell casing in the courtyard of 112 Magnolia Street.

Discussion. 1. Sufficiency of the evidence. The defendant argues that the evidence was insufficient on three grounds.[4] First, the defendant argues in passing that the evidence was insufficient to prove that the firearm's barrel was shorter than sixteen inches, an element of the crime. The relevant definition of "firearm" includes a requirement that the barrel of the pistol, revolver, or other weapon be shorter than sixteen inches. See G. L. c. 140, § 121 (definition applies to G. L. c. 140 § 131 [requirement to obtain firearm license], and other sections). Raspberry and Avant described the firearm as a handgun. While talking to the police, the defendant called the

[4] The defendant moved for a required finding of not guilty on only the first ground. "However, findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice." Commonwealth v. McGovern, 397 Mass. 863, 867-868 (1986).

gun "small." A handgun is a short firearm and the jury could conclude beyond a reasonable doubt that the gun's barrel was shorter than sixteen inches. See Commonwealth v. Sperrazza, 372 Mass. 667, 670 (1977); Commonwealth v. Sylvester, 35 Mass. App. Ct. 906, 907 (1993) (victim testified that he thought his assailant used .25 caliber Beretta automatic handgun).

Second, the defendant argues in passing that the evidence was insufficient to prove that the gun was a working firearm. However, Avant and Raspberry testified that they heard gunshots, the defendant admitted -- both to Avant and to the police -- that he had fired the gun, and the police retrieved a shell casing whose caliber matched the description of the gun. The evidence was sufficient to prove that the gun was a working firearm. Commonwealth v. Mendes, 75 Mass. App. Ct. 390, 397 (2009) (gunshots and empty shell casings were among factors that proved working firearm); Commonwealth v. Kalhauser, 52 Mass. App. Ct. 339, 347 (2001) (defendant admitted to coworker and police officer that he had working firearm).

Third, the defendant argues that a conviction cannot be "based solely on evidence of an extrajudicial confession by the accused." Commonwealth v. Forde, 392 Mass. 453, 457 (1984). "The corroboration rule requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not

imaginary." Id. at 458. Avant and Raspberry heard gunshots; the police retrieved a shell casing; and Avant saw the defendant carry the handgun outside. That was sufficient to prove that the defendant's crime of possessing a firearm outside his home was real and not imaginary.

The trial judge properly denied the defendant's motion for a required finding of not guilty.

2. Police officers' testimony. The defendant asserts that the police officers' testimony regarding their investigation was improper and unfairly prejudiced his right to a fair trial. He raises two arguments, neither of which he raised during trial. Because the defendant's objection was not preserved, we review to determine whether the admitted testimony created a substantial risk of a miscarriage of justice. See Commonwealth v. Espinal, 482 Mass. 190, 204 (2019). The defendant first contends that the police witnesses were implicitly repeating and crediting Raspberry's testimony when three officers testified that, after talking with Raspberry, they looked for the defendant to arrest him. We disagree. The officers testified that after receiving unspecified information from witnesses they acted. Such testimony is a routine technique to avoid invoking hearsay. See Commonwealth v. Tanner, 66 Mass. App. Ct. 432, 438-439 (2006) (Police "may state that actions were taken upon 'information received' or 'as a consequence of a conversation'

with a particular witness" to avoid hearsay issues). Further, merely because the police act on information does not mean that their action verifies the information or that testimony about their action unfairly prejudices a defendant. See Commonwealth v. Rosario, 430 Mass. 505, 510 (1999).

Next, the defendant argues that when the officers testified about their search for, and arrest of, the defendant, they used unnecessary and prejudicial details. Police may explain their presence at a crime scene and explain why they arrested a defendant, see Commonwealth v. Cohen, 412 Mass. 375, 393 (1992), and the Commonwealth is generally allowed to anticipate a defense and try to counter it during its case-in-chief, rather than waiting for rebuttal. See Commonwealth v. DePina, 476 Mass. 614, 630 (2017).

In addition, testimony that the police set up a perimeter at 112 Magnolia Street to keep "someone" from running out of the rear of the building helped explain how they found the shell casing. Testimony about the defendant's arrest explained how they came to advise him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and to hear his admissions. Testimony that the police searched various sewers for the gun, with the defendant pointing out which sewers to look in, helped the Commonwealth explain the absence of the gun at trial. See DePina, 476 Mass. 630. We discern no error in the police

officers' testimony. See Commonwealth v. Sullivan, 76 Mass. App. Ct. 864, 867-869 (2010).

3. Cross-examination of the defendant. The defendant next asserts that the Commonwealth's cross-examination was improper, as it required the defendant to comment on other witnesses' truthfulness and that the prosecutor prevented the defendant from providing answers, which violated his right to a fair trial.

The defendant's testimony at trial essentially denied the Commonwealth's version of events. On cross-examination of the defendant, the judge sustained an objection by defense counsel to the prosecutor's inquiry of the defendant whether Avant's testimony was true. Even if the question was improper, there was no error, because the objection was sustained. See Commonwealth v. Elam, 412 Mass. 583, 586 (1992).

Likewise, we find no reversible error where the prosecutor asked other questions, exploring inconsistencies between the defendant's and the Commonwealth's version of events, even though a few of the questions implicitly asked the defendant to comment on other witnesses' truthfulness.[5] See Commonwealth v. Johnson, 412 Mass. 318, 328 (1992). We see no substantial risk

[5] On two occasions when the defendant disagreed with the testimony of Commonwealth witnesses, the prosecutor asked, "So that never happened either?" and "So that's not true either?"

of a miscarriage of justice, because the unobjected-to questions and answers went primarily to the charges of assault and battery, making threats, and assault by means of a dangerous weapon, all of which resulted in not guilty verdicts.

The defendant also faults the prosecutor's cross-examination of him for insisting on "yes" or "no" answers. He argues that such questions violated his right "to be fully heard in his defense" under art. 12 of the Massachusetts Declaration of Rights. However, the defendant was given and took advantage of the right to be fully heard during direct examination, and he was given the opportunity to be fully heard during redirect examination, to clarify or expound on any "yes" or "no" answers that he thought were incomplete or misleading, but he did not take advantage of the opportunity. In addition, the judge told the prosecutor more than once to slow his cross-examination and allow the defendant to finish his answers. The defendant's right to be heard in his defense was not violated.

4. Prosecutor's closing argument. The defendant maintains that during closing arguments, the prosecutor argued facts not in evidence, misstated the evidence, impermissibly vouched for the credibility of witnesses, and shifted the burden of proof to the defendant. Because there was no objection at trial, "[w]e

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The defendant did not object and answered "No" to both of these questions.

review these claims for error and, if there was error, for a substantial risk of a miscarriage of justice." Commonwealth v. Rivera, 91 Mass. App. Ct. 796, 801 (2017).

Although "prosecutor[s] may not misstate evidence or refer to facts not in evidence in a closing argument," Commonwealth v. Goddard, 476 Mass. 443, 449 (2017), they are entitled "to marshal the evidence and suggest inferences that the jury may draw from it." Commonwealth v. Drayton, 386 Mass. 39, 52 (1982).

Here, the defendant claims that the prosecutor misstated facts relating to the defendant's testimony of hearing gunshots on Alexander Street, and to Avant's description of the handgun. We discern no reversible error. The misstatements were limited to collateral issues. The judge instructed the jury that their memory of testimony controls, and that closing arguments are not evidence, but rather "the best effort of the attorneys to review the evidence." We do not see how the misstatements possibly made a difference in the jury's conclusion.

Additionally, the defendant asserts that the prosecutor improperly vouched for the credibility of the Commonwealth's witnesses. We disagree. "Improper vouching can occur if an attorney expresses a personal belief in the credibility of a witness, or indicates that he or she has knowledge independent of the evidence before the jury." Commonwealth v. Wilson, 427

Mass. 336, 352 (1998). Here, the prosecutor did not express any personal belief in the credibility of the witnesses, nor did he suggest that he had any personal knowledge that supported the witnesses' credibility. Taken with the judge's instruction to the jury that closing arguments by counsel are not evidence, we conclude that there was no error in the prosecutor's comments, let alone error creating a substantial risk of a miscarriage of justice.

Lastly, the defendant maintains that the prosecutor's comment during closing argument that "[m]y brother didn't ask the police officers about any prior shooting on Alexander Street," improperly shifted the burden of proof to the defendant.

In his closing, the defense attorney argued to the jury that the Commonwealth had not tried to disprove the shooting on Alexander Street. The challenged statement was made in response to the defendant's argument. The prosecutor's statement was brief, isolated, and not the focus of his closing argument. See Commonwealth v. Mitchell, 428 Mass. 852, 857 (1999). "[I]t did not create a substantial risk of a miscarriage of justice in light of the judge's clear and direct instructions on the presumption of innocence and the Commonwealth's burden to prove

its case beyond a reasonable doubt." Commonwealth v. Springer, 49 Mass. App. Ct. 469, 476-477 (2000).

Judgment affirmed.

By the Court (Desmond, Sacks & Lemire, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: July 15, 2019.

[6] The panelists are listed in order of seniority.